U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 23 June 2004

CASE NO.: 2003-LHC-02645

OWCP NO: 03-27103

In the Matter of:

WILLIAM DAVIS,
Claimant,

v.

HOLT CARGO SYSTEMS, INC.,
Employer,

and

CRUM & FORSTER,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances: Brian Steiner, Esquire
For Claimant

Stephen J. Harlen, Esquire
For Employer/Carrier

John Strawn, Esquire
For the Party-in-Interest

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER
DENYING MODIFICATION AND
SPECIAL FUND RELIEF

This is a claim for modification under Section 22 of the Longshore and Harbor Workers' Compensation Act ("the Act" or "LHWCA"). 33 U.S.C. § 922.

In a Decision and Order issued July 17, 2002 Administrative Law Judge ("ALJ") Robert D. Kaplan awarded Claimant medical benefits, permanent total disability benefits, and attorneys fees and costs. *Davis v. Holt Cargo Sys.'s ("Davis I")*, 2001-LHC-02647, at *14. In a Decision and Order issued September 6, 2002 ALJ Kaplan granted Employer's request for reconsideration but denied the relief requested. *Davis v. Holt Cargo Sys's ("Davis I on Reconsideration")*, 2001-LHC-02647, at *2. Employer now seeks modification.

I held a hearing in this matter on February 5, 2004 in Philadelphia, Pennsylvania at which time the parties were given the opportunity to present evidence and make argument. The transcript of the hearing will be cited throughout this Decision and Order by page number as "Tr. at --."[1]

The Decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

- Has Employer demonstrated a change in conditions since ALJ Kaplan's prior Decision and Order.
- Is Employer entitled to Special Fund relief.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of the Case

Claimant's Testimony

Claimant testified that he lives in Millsboro, Delaware and drove to Philadelphia for the hearing.[2] (Tr. at 13.) He testified that he receives workers' compensation benefits and is treating with Drs. Johnson, Moufawad. (Tr. at 13-14.)

He was examined by Dr. Johnson on December 12, 2003 and January 9, 2004 but prior to those visits had not seen Dr. Johnson for more than a year before. (Tr. at 14.) He sees Dr. "Sami" Moufawad every two months. (Tr. at 14-15.) He also treats at the Veterans' Administration in Philadelphia for blood pressure and foot and shoulder problems. (Tr. at 15.)

---

[1] At the hearing, I marked and received ten ALJ exhibits as "ALJX1-ALJX10." (Tr. at 11.) Claimant submitted six exhibits which I marked and received as "CX1-CX6." (Id.) Employer submitted nine exhibits, which I marked and received as "EX1-EX9." (Tr. at 12.)

Post-hearing, Employer submitted additional exhibits, including the testimony of Rosalyn Pierce; records from the Veterans' Administration; a March 7, 2003 letter from District Director Emma Riley; and District Director Riley's July 14, 2003 letter denying Employer's application for Special Fund relief. I have marked and received these exhibits as "EX10, EX11, EX12, EX13," respectively. Post-hearing, Claimant submitted the testimony of Dennis Mohn and Dr. Leonard Johnson, which I hereby mark and receive as "CX7" and "CX8," respectively.

[2] Claimant testified that he is 68 years old. (Tr. at 28.)

He testified that he recently had an operation on his foot and one of his toes. (Tr. at 15-16.) "[I]n the '60s," he stated, he had surgery on his foot and over the years he has seen doctors for arch supports. (Tr. at 16.) He testified, however, that he has "worked on it [his foot] all [his] life." (Tr. at 17, 33.)

He testified that he collects Social Security benefits and a small pension and has a driver's license and is able to drive. (Tr. at 17.) He graduated from high school in 1954, served in the Air Force for three years doing maintenance, and was able to read schematics. (Tr. at 18-19.) He is able to read a newspapers but not well. (Tr. at 19.)

He testified that he has not worked since his back injury. (Tr. at 20.) He has not looked for light duty work. (Id.) Of the three jobs sent to him by Employer's vocational expert, he testified that he only sought employment with Econo Lodge. (Tr. at 20-21.) He also stated that he had a hernia operation and a strain in his back and he admitted to missing time from work for both pre-1998 injuries. (Tr. at 21-22.)

Claimant does not believe he can work. (Tr. at 22.)

On cross-examination, Claimant testified that Dr. Sami examines him and prescribes medications, including "Oxylon" and "Terizon," one of which he takes every eight hours and the other of which he takes three times a day. (Tr. at 22-23.) He takes pills every day to relieve his pain. (Tr. at 23.) He testified that he went back to Dr. Johnson for further treatment for his back and left thigh pain which has gotten worse. (Tr. at 23-24.)

On additional cross-examination, Claimant testified that he does drive but not "too far." (Tr. at 24.) He testified that he had to drive "[a]bout 25 to 27 miles" to apply for the Econo Lodge job on February 1, 2004 but that when he got there, someone told him the job was gone, taken. (Tr. at 25-26.) When asked about the America Inn job, which Claimant did not seek, he explained that he has never done front-desk work at a motel. (Tr. at 27.) He also stated that he has never dealt with the public in terms of answering phones or taking messages. (Id.) When asked about the "care provider" position, he stated that he had never done this type of work either.[3] (Tr. at 28.)

He also testified that though he takes care of himself, he does not believe he would be able to help take care of others, helping them to dress, cook, and clean. (Tr. at 29.) If asked on a job application, Claimant explained he would respond "Yes" to whether he was taking medication and would explain that the medication was for his back injury. (Tr. at 30.)

[3] Among Employer's exhibits was a January 26, 2004 letter addressed to Claimant from Rosalyn Pierce. (EX8.) The letter explained that a "job opportunity" at Econo Lodge had been located for Claimant and that he should "complete an application on Monday, February 2, 2004." (Id.) A January 13, 2004 "Status Report" identified two other positions, Bayshore Services and Americinn, and explained that Claimant "filed his application with the employers as requested" but that "[n]o job offer was tendered." (Id.) Both of these latter light-duty positions were approved by Dr. Guttmann on January 15, 2004. (Id.)

When asked how his condition has progressed between the first examination with Dr. Guttmann and the most recent, he stated that it has gotten worse. (Tr. at 31.) He explained that he has a shocking feeling and that he does not lift anything real heavy. (Id.) He stated that he has had no significant injuries to any part of his body since November 27, 2001. (Tr. at 32.)

Medical Opinions of Record

Dr. Gad Guttmann

Dr. Guttmann prepared a report of examination dated December 10, 2002 (EX7) and testified on December 10, 2003 (EX9).

In the December 2002 report, Dr. Guttmann (Board-certified orthopedic surgeon) noted that he had examined Claimant on February 1, 1999 and July 19, 2001. (EX7, EX9 at 4-5.) He recorded Claimant's history, results of physical examination, and his review of his previous two reports. (EX7.) The doctor commented that he "found no different findings from the ones that [he] found on [his] previous examinations." (Id.) He opined that Claimant "has subjective complaints of mechanical low back pain and pre-existing degenerative spondylarthritis of the lumbar spine." (Id.) He found that the "injury of 8/24/98 resulted in a temporary aggravation, and now, four years later, these injuries have … resolved, and [Claimant] is left with his underlying disease that is causing him low back pain." (Id.) He opined that Claimant's current symptomatology "is not related to his accident," but that Claimant does remain restricted due to his "overall habitus and spondylarthritis" which places Claimant in "the light-duty category." (Id.)

He testified that his findings on his last examination, December 2002, were similar to his previous examinations. (EX9 at 11.) The doctor characterized Claimant's August 1998 injury as a "soft tissue like sprain and strain, which was superimposed on an already existing degenerative disc disease." (EX9 at 13.) He also believed the strain and sprain had "resolved," leaving Claimant with the underlying disease, the disease which is causing low back pain. (Id.) He opined that Claimant no longer needed treatment because the treatment he is now receiving is "symptomatic pain relief medication." (Id.)

He opined that his diagnoses were "to a certain degree" present before the injury of August 24, 1998. (EX9 at 14-15.) He opined that Claimant's current condition ("spondylarthritis") is associated with his feet and abdomen, his poor musculature and his weight, all of which preexisted the injury and have worsened with age. (EX9 at 15-16.) He testified that he, nevertheless, placed restrictions on Claimant, because "he has pain." (EX9 at 16.) Accordingly, he restricted Claimant to "full time in a capacity of light duty." (EX9 at 17.)

When asked to assume if Claimant's work injury still plays a factor in Claimant's disability, whether Claimant's current disability would be materially and substantially greater because of his pre-injury conditions, he testified that he could not "really answer the question" but that Claimant's disability "would be much much less than what would have been the case at the present time." (EX9 at 18-21.) He then clarified that Claimant's disability has been

contributed to and made greater by his pre-injury problems, including arthritis, the foot problem, and other conditions. (EX9 at 21.)

On cross-examination, Dr. Guttmann testified that between his July 2001 and December 2002 examinations, the results have not changed, except that Claimant's arthritis has probably gotten worse. (EX9 at 23-24, 46.) He also testified that he could not remember whether he asked Claimant if his pain had gotten worse. (EX9 at 25-26.) He further explained that Claimant "has good days and bad days" but is not totally disabled. (EX9 at 27.) He also testified that as Claimant gets older, his arthritis will get worse and he will have more symptoms. (EX9 at 27-28.) He further clarified his opinion that the medication for Claimant's pain does not treat his problem but does relieve him of his symptoms. (EX9 at 30-31.)

On further cross-examination, the doctor testified that he never saw any medical records pre-dating Claimant's 1998 injury. (EX9 at 46.)

Dr. Leonard Johnson

Dr. Johnson prepared a report dated January 26, 2004 (CX1) and gave testimony on March 25, 2004 (CX8).

In the January, 2004 report, Dr. Johnson (Board-certified in osteopathic family practice) explained that he examined Claimant on December 12, 2003 and January 9, 2004. (CX1, CX2.) He noted that during both examinations Claimant complained of pain in his lower back and both legs and tingling in his lower back radiating to his legs. (CX1.) He noted the results of his January physical examination and diagnosed "lumbar disc disease and possible lumbar disc herniation." (Id.)

He testified that his January 2004 diagnosis was the same condition he diagnosed in 1999, 2000, 2001, and 2002. (CX8 at 18.) He stated that Claimant has not recovered from his work-related condition and that his condition has probably gotten worse. (CX8 at 16-17.) He, moreover, opined that Claimant's work injury caused an aggravation of his underlying degenerative arthritis, disabling him from any work. (CX8 at 17-18.)

With respect to Dr. Guttmann's opinion, he disagreed and opined that Claimant is incapable of light-duty work. (CX8 at 18-19.) He further opined that since his prior testimony before ALJ Kaplan, Claimant's condition has gotten worse. (CX8 at 19.) Lastly, the doctor testified that he reviewed the records from the Veterans' Administration and those documents indicated that Claimant had been treating with them for coronary artery disease, hypertension, cardiac catherization, and foot problems. (CX8 at 20-21.)

On cross-examination, he stated that he had not seen Claimant between 2001 and December of 2003. (CX8 at 22-23.) He further stated that his treatment ended in February, 2001. (CX8 at 23.) He also stated that he was not able to look through the entire stack of Veteran Administration records but that he was able to get the "principal opinion of the file." (CX8 at 24.) He had not reviewed any medical depositions nor had he reviewed the reports of the vocational counselors. (CX8 at 25.) He was, however, aware of Dr. Guttmann's opinion

from having reviewed his report. (Id.) He testified that he did not know what treatment Claimant is now getting and that the Veterans Administration records do not reflect treatment for Claimant's back. (CX8 at 26-27.)

Vocational Evidence of Record

Rosalyn Pierce

Ms. Pierce (certified rehabilitation counselor) prepared an "Earning Power Assessment" dated July 9, 2003. (EX4.) She also prepared a report dated November 3, 2003. (EX5, EX6, EX10 at 6.) Finally, she testified on March 29, 2004. (EX10.)

In the Earning Power Assessment, she "assessed the future earning potential and vocational alternatives for [Claimant]." (EX4.) She recorded Claimant's educational/vocational background; documented Claimant's work history; and explained the difference between sedentary, light, medium, and heavy duty work. (Id.) After identifying Claimant's light duty medical restrictions based on Dr. Guttmann's opinion, she identified eight job openings within a 50-mile radius of Claimant's home and the corresponding salaries for those jobs. (Id.) She concluded that Claimant demonstrated "an earning capacity between $5.15 to $10.00 per hour" and stated that the average hourly wage for the eight positions is "$7.85 per hour." (Id.)

In the November 2003 report, she documented Claimant's educational/vocational background, which conformed to the background Claimant provided at the hearing. (EX6.) She also noted a criminal conviction in Claimant's past. (Id.) She noted Claimant's work history as including, not only work as a stevedore, but 30-year-old employment as a baker and insulator. (Id.) She provided a list of definitions classifying various job types and Claimant's result on vocational testing. (Id.) She concluded with the following: "[g]iven [Claimant's] age of 67, his functional illiteracy, exclusive employment history, the depressed labor market in southern Delaware, and his sedentary work restrictions, additional time will be required to identify job opportunities that are commensurate with his vocational profile." (Id.)

She testified that she met with Claimant resulting in her November, 2003 report.[4] (EX10 at 11.) She testified that she reviewed Dr. Guttmann's reports and deposition and knew that he opined that Claimant was capable of light duty work. (EX10 at 12-13.) Based on his 30 years as a stevedore, she testified, Claimant did not have any skills that could "be easily … transferred to work at the light level or sedentary." (EX10 at 14.) She testified that she reviewed Mr. Mohn's report and that his results were "very similar" to hers. (EX10 at 17-18.) She testified that given Claimant's work restrictions, he was capable of "entry-level, unskilled type of job opportunities that would not require a lot of lifting, a lot of bending, squatting, climbing." (EX10 at 19.) She referred him to three jobs and explained why she thought each was appropriate. (EX10 at 20-26.)

[4] A large part of Ms. Pierce's testimony tracks her extensive reports. I therefore will not rehash her entire testimony but will rather summarize those parts that add to her reports.

On cross-examination, she testified, among other things, that Claimant is an "angry man" and that "having a negative attitude and personality can be an impediment in not only your vocational life but in your social and personal life as well." (EX10 at 52-56.)

Dennis L. Mohn

Mr. Mohn (certified vocational expert) prepared a vocational assessment dated January 27, 2004. (CX3, CX4.) In this report, he determined Claimant's "ability to earn wages as described by Rosalyn Pierce." (CX3.) He reviewed various records from the prior proceeding before ALJ Kaplan and also considered medical, social/family, educational and vocational factors. (Id.) He also performed vocational testing and a transferable skills analysis, concluding that Claimant's other work experience "30 years ago" is "obsolete or forgotten." (Id.) After confirming the employment information provided by Ms. Pierce and preparing a "Vocational Assessment" section, he opined that "only one of the nine employers [Ms. Pierce] located, Barrett Business Services, had work that might be within [Claimant's] vocational capabilities and the physical capacities as described by Dr. Guttman." (Id.) Finally, he opined that the information in Ms. Pierce's reports "is sufficiently inaccurate and flawed, … , that it cannot be considered reflective of [Claimant's] 'future earning potential.'" (Id.)

He testified that he interviewed Claimant. (CX7 at 9-10.) He explained why he thought it was important to meet with Claimant before forming his vocational opinion, *i.e.* why it was important to see how Claimant presents himself. (CX7 at 10-12.) He explained the testing he performed and how Claimant performed poorly. (CX7 at 12-13.) He opined that Claimant would not be employable "in any way" and that nothing has changed since ALJ Kaplan's prior decision. (CX7 at 18-20.)

On cross-examination, he stated that he was only aware of Claimant going to look for one job, the Econo Lodge job that Ms. Pierce supplied. (CX7 at 22.) He acknowledged that Claimant did work requiring "[g]ood mechanical ability" and that he had supervisory experience. (CX7 at 26.) He stated that Claimant has the ability to control operation of equipment, adjust his reactions, monitor machinery, speak with others, and determine what tools and equipment are needed to do a job. (CX7 at 29-30.) He also noted that Claimant has a commercial driver's license. (CX7 at 30.) He testified that "there might be some work that [Claimant] could physically do" but was unsure whether Claimant could secure the work. (CX7 at 32-33.) He agreed that based on Dr. Guttmann's opinion Claimant would be medically able to do light duty work. (CX7 at 33-34.)

Additional Documentary Evidence of Record

Among Employer's post-hearing submissions were records from the Veterans Administration. (EX11.) Although I have not read every single document that comprises this submission, to the extent Employer references those documents in its closing argument, I shall consider those records.

A letter dated March 7, 2003 from District Director Emma Riley acknowledges receipt of a request for an extension of time for filing a petition for 8(f) relief and gives the Employer a due

date of "April 30, 2003." (EX12.) Employer's application for 8(f) relief before the District Director is included with its exhibits and has a certificate of service dated April 29, 2003. (EX2.)

In a letter dated July 14, 2003, the District Director denied Employer's 8(f) application because it had not satisfied the manifest requirement. (EX13.) The letter states that no evidence of record "pre-date[s] the August 24, 1998 employment injury." (Id.) It also states, "[a] post-injury diagnosis, even where based on medical records in existence prior to the date of injury of an undiagnosed condition is insufficient to satisfy the manifest requirement." (Id.)

B. Discussion

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atl. Marine, Inc. And Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

It has been consistently held that the LHWCA must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993).

- Employer Has Not Shown A Change in Claimant's Physical or Economic Condition

Section 22 of the LHWCA provides:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions . . . , the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, . . . , review a compensation case (. . .), and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. § 922. It is well established, "[t]he party requesting modification based on a change in condition has the burden of showing the change." *Vasquez v. Cont'l Mar. of San Francisco, Inc.*, 23 B.R.B.S. 428, 430 (1990) (citing *Winston v. Ingalls Shipbuilding, Inc.*, 16 B.R.B.S. 168, 172 (1984)). "[A] disability award may be modified under § 22 where there is a change in the

employee's wage-earning capacity, even without any change in the employee's physical condition." *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 301 (1995).

Employer argues that it has shown a change in both Claimant's physical and economic condition. With respect to the physical element, Employer relies on Dr. Guttmann's opinion as contained in his reports and testimony. Employer first argues that Claimant's current disability is not at all attributable to his August 1998 injury but rather is related to his underlying arthritis. Thus, Employer "seeks a complete cessation of work related disability." (Employer/Carrier's Brief, p. 12.) Relying on Ms. Pierce's opinion, Employer next argues that it has presented evidence of suitable alternative employment (a change in economic condition), establishing a post-injury wage-earning capacity of $280.00 to $300.00 per week. (Id., p. 13-14.) Finally, Employer argues that Claimant has not shown a diligent job search and a willingness to work. (Id., p. 15.)

Claimant counters that Employer has not met its burden. Claimant notes that Dr. Guttmann has testified that Claimant's condition is unchanged and that Claimant has had a worsening of his overall condition. (Claimant's Brief, p. 17.) Claimant notes that Dr. Guttmann rendered the same opinion in the first proceeding before ALJ Kaplan and his opinion was rejected there. (Id.) Claimant also argues that Employer has failed to show suitable alternative employment, finding fault in several facets of Ms. Pierce's analysis. (Id., p. 18-20.)

Here, Dr. Guttmann opined that Claimant was capable of light-duty work. He opined that any remaining partial disability was not attributable to the August 1998 injury but was caused by his pre-existing arthritis. The August 1998 injury, according to Dr. Guttmann, has resolved and Claimant's current disability is related to his pre-existing non-work related arthritic condition. Dr. Guttmann, nevertheless, stated that his findings on physical examination were no different from his previous examination. Moreover, he conceded that Claimant's arthritis has gotten worse.

Dr. Johnson, on the other hand, diagnosed lumbar disc disease and possible lumbar disc herniation, the same diagnoses he had made back as early as 1999. Dr. Johnson attributed these diagnoses to the work-related accident and opined that Claimant's condition has probably gotten worse. He opined that Claimant's work injury aggravated his underlying arthritis disabling him from work. He continued to believe that Claimant's inability to perform any work was a result of the work injury which aggravated his underlying condition.

ALJ Kaplan summarized Drs. Guttmann and Johnson's opinions in the first proceeding. He noted that Dr. Guttmann first opined that Claimant's back complaints "were only partly related to his accident since he had pre-existing and progressive degenerative osteoarthritis at the time of his accident." *Davis I*, at *5. By the time of Dr. Guttmann's second examination in the first proceeding, he opined that "Claimant's symptoms were due to his pre-existing disease-not the work injury." *Id.* ALJ Kaplan noted that Dr. Johnson "first examined Claimant on November 17, 1998" and "has seen Claimant multiple times since this first exam." *Id.* at 7. He documented Dr. Johnson's testimony that "Claimant's condition is related to the August 24, 1998 accident since it permanently aggravated his degenerative disc disease." *Id.* He also noted

Dr. Johnson's opinion that "Claimant's persistent symptoms of back pain are related to this injury." *Id.*

In the course of analyzing whether Claimant was entitled to medical benefits, ALJ Kaplan weighed the opinions of Drs. Johnson, Moufawad, Guttmann, Lee, and DiBenedetto. *Davis I*, at *13. He noted that these doctors agreed "that the injury Claimant suffered as a result of the August 24, 1998 accident was an aggravation of his pre-existing degenerative disc disease." *Id.* The difference of opinion, he noted, was whether the injury had resolved. *Id.* ALJ Kaplan ultimately concluded, "[b]ased on the opinions of Drs. Johnson, Moufawad, and Lee, and Claimant's testimony," that "Claimant's continuing symptoms are related to the accident and injury that occurred on August 24, 1998." *Id.*

Here, Employer would have me credit Dr. Guttmann's opinion over Dr. Johnson's and have me conclude that Claimant's work-related disability has resolved and any current disability is unrelated to his August 1998 accident. In doing so, Employer would be able to obtain "a complete cessation of work related disability." (Employer/Carrier's Brief, p. 12.) Employer's request, however, is in essence a request to re-argue issues of causation dealt with under Section 20 of the Act.[5] The Section 20(a) presumption, however, is inapplicable to the issue of whether a claimant's condition has changed since the prior award. *Leach v. Thompson's Dairy, Inc.*, 6 B.R.B.S. 184 (1977). ALJ Kaplan, who was in a far better position than I to resolve issues of causation, concluded that Claimant's "continuing symptoms are related to the accident and injury that occurred on August 24, 1998." *Davis I*, at *13. He did so having considered Dr. Guttmann's opinion that "Claimant's symptoms were due to his pre-existing disease-not the work injury." *Davis I*, at *5. Dr. Guttmann, here, has not changed his opinion. Not only has he written that his findings were no different from his previous examination, he has also rendered the same opinion considered by ALJ Kaplan. This is not preponderant evidence of a change in Claimant's physical condition. Moreover, even if it were, Claimant's testimony, my observations of him during the hearing, and Dr. Johnson's opinion, outweigh Dr. Guttmann's opinion that Claimant's physical condition is any different now than it was during the first proceeding. Therefore, I must again conclude that Claimant is permanently disabled.

With respect to Claimant's ability to perform suitable alternative employment, I must similarly conclude that Claimant is incapable of the employment provided by Ms. Pierce. Ms.

[5] Section 20 of the LHWCA deals with causation, providing that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—(a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920. "Section 20(a) of the Act . . . provides claimant with a presumption that his injury is causally related to his employment if claimant establishes a harm and that working conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm." *Uglesich v. Steverdoring Servs. of Am.*, 24 BRBS 180, 182 (1991) (citing *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988)). "Where an employment-related injury aggravates, accelerates or combines with a non-work-related infirmity, disease or underlying condition, the entire resultant disability is compensable." *Id.* (citing *Rajotte v. Gen. Dynamic Corp.*, 18 BRBS 85 (1986)). As I read ALJ Kaplan's Decision, Claimant made this showing in the first proceeding. *See Davis I*, at *13.

Pierce's opinion was premised on Dr. Guttmann's opinion that Claimant is capable of light duty work. Because I find that Dr. Guttmann's opinion does not show a physical change and because Ms. Pierce relied on his opinion in finding employment for Claimant, I must conclude that Employer has not shown the availability of suitable alternative employment.

- Employer is Not Entitled to Special Fund Relief

The Third Circuit has held that three conditions must be met before an employer can receive Special Fund relief. *Pennsylvania Tidewater Dock Co. v. Director, OWCP*, 202 F.3d 656, 658 (3d Cir. 2000). Those conditions are as follows: (1) "the employee must have been suffering from a permanent partial disability at the time he was injured or sickened on the job," (2) "the employer must demonstrate that the disability was manifest to the employer," and (3) "the employer must demonstrate that the worker's pre-existing disability contributed to the permanent total disability such that the employee's disability 'is not due solely' to the workplace injury." *Id.* (citing *Director, OWCP v. Sun Ship Inc. ("Ehrentraut")*, 150 F.3d 288, 293-95 (3d Cir. 1998)).

Employer argues that Claimant was suffering from more than one permanent partial disability. Employer points to Claimant's pre-existing arthritis, his foot deformity, and deformity in his knees. Employer argues that the disability was manifest to it based on the Veterans' Administration records, citing several portions dating back to 1975. Finally, Employer argues that Claimant's current permanent total disability is made worse by these pre-existing conditions.

The Director and Claimant both have argued that Employer is not entitled to Special Fund relief. Claimant notes that the District Director denied Employer's application because it had not shown a manifest permanent partial disability. (EX13.) It also notes that Claimant worked 30 years as a stevedore without difficulty.

The Director argues that Employer has presented no evidence demonstrating how any of the three conditions which Employer relies upon contributed to Claimant's work-related disability or rose to the level of a pre-existing permanent partial disability. The Director argues that Employer has put forth no evidence as to how Claimant was limited by his right foot deformity or his knee condition prior to his accident. The Director notes that there is no evidence connecting his foot or knee conditions to his back condition. Finally, the Director notes that while Dr. Lee's report states how Claimant's discogenic disc disease contributes to and increases Claimant's level of disability, it does not establish that the condition was manifest to Employer or that it rose to the level of a pre-existing permanent partial disability.[6] The Director notes "[t]he manifest requirement of Section 8(f) may be satisfied either by employer's actual knowledge of the pre-existing condition or by medical records from which claimant's condition could be objectively determined prior to the subsequent injury." (Director's Brief, p. 4); *see also Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 81-82 (1st Cir. 1992).

[6] Dr. Lee's October 6, 1999 report was attached to EX2 and was considered by ALJ Kaplan in the first proceeding. *See Davis I*, at 5.

Claimant did testify that he had a foot problem but that he worked on it all his life. As Claimant was able to work on it, this foot problem does not amount to a pre-existing permanent partial disability. Claimant also stated, however, that he had missed time from work for a hernia operation and a strain in his back. As Drs. Guttmann and Johnson both agree, Claimant's August 1998 injury aggravated some type of pre-existing back condition -- for Dr. Guttmann the pre-existing condition was arthritis, for Dr. Johnson, a lumbar disc herniation. Either condition could constitute a pre-existing partial disability. Accordingly, Employer has shown that Claimant was suffering from a pre-existing permanent partial disability at the time of his work-related injury.

As noted above, Employer relies on the Veteran Administration records to establish a manifest pre-existing permanent partial disability.[7] Employer cites to several portions of those records. (Employer's Brief, p. 19.) All of the portions Employer cites to, however, fail to discuss Claimant's pre-existing back condition. Rather, they discuss foot problems, hypertension, asthma, coronary artery disease, and osteoarthritis.[8] Moreover, Dr. Johnson's review of the records did not find evidence of treatment for Claimant's back (CX8 at 26-27), only treatment for coronary artery disease, hypertension, cardiac catherization, and foot problems (CX8 at 20-21). Accordingly, I find no evidence showing a pre-existing back condition that was manifest to Employer.

Because Employer has not shown a *manifest* pre-existing permanent partial disability, I need not determine whether Claimant's pre-existing disability contributed to his permanent total disability such that Claimant's disability is not due solely to the work injury.

On the basis of the foregoing, Employer has not shown entitlement to Special Fund relief.

ORDER

- Employer's request for modification and Special Fund relief is hereby DENIED.

A

RALPH A. ROMANO
Administrative Law Judge

[7] Employer cannot rely on Dr. Lee's October 1999 report because it post-dates Claimant's work-related injury in 1998.

[8] Osteoarthritis is a "noninflammatory degenerative joint disease occurring chiefly in older person, characterized by degeneration of the articular cartilage, hypertrophy of the bone at the margins, and changes in the synovial membrane." *Dorland's Illustrated Medical Dictionary* (26th ed. 1985), 941.